Filed 1/14/19 P. v. Cazares CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN GUILLERMO CAZARES, Defendant and Appellant.	2d Crim. No. B285247 (Super. Ct. No. 2005028022) (Ventura County)

Juan Guillermo Cazares appeals from a postjudgment order denying his motion under Penal Code[1] section 1473.7 to vacate his 2004 guilty plea conviction for possessing ephedrine and pseudoephedrine with the intent to manufacture methamphetamine (Health & Saf. Code, former § 11383, subd. (c)(1)). Appellant contends the motion should have been granted on the ground that his trial attorney provided ineffective assistance counsel by misadvising him regarding the immigration consequences of his guilty plea. We affirm.

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[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

In March 2004, appellant fled on foot after his truck was subjected to a traffic stop. Inside the truck, officers found bottles containing a total of 480,000 pseudoephedrine pills. Appellant was subsequently charged in Orange County Superior Court with one count of possessing ephedrine and pseudoephedrine with the intent to manufacture methamphetamine, and one misdemeanor count of resisting or obstructing a peace officer (§ 148, subd. (a)(1)). He initially entered a plea of not guilty, but later withdrew his plea and pled guilty to both charges.

Appellant pled guilty with the understanding he would be placed on three years probation and serve 360 days in county jail. Although the court retained the authority to impose a state prison sentence, it was expressly provided that "[appellant] may withdraw [his] plea if [the] court decides [a] prison sentence is appropriate. 1 year maximum for this plea."

Before pleading guilty, appellant signed and initialed a plea form containing numerous advisements. One of the initialed advisements states, "I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." At the end of the form, just above appellant's signature, he initialed a statement declaring "under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney, and everything on this form is true and correct."

Appellant's retained attorney, Scott Ciment, also signed the guilty plea form beneath the following statement: "I am attorney of record and I have explained each of the above rights to the

defendant, and having explored the facts with him/her and studied his/her possible defenses to the charge(s), I concur in his/her decision to waive the above rights and enter a plea of guilty." Appellant also initialed Ciment's statement.

At the change of plea hearing, appellant was assisted by a Spanish language interpreter. During the plea colloquy, the court asked appellant, "[D]id you go over these documents with your attorney and place your initials in the boxes and date and sign the form, and are you pleading guilty freely and voluntarily?" Appellant responded in English, "Yes." The court asked appellant to answer in Spanish, and he did so. Appellant also acknowledged that the guilty plea form had been translated from English to Spanish so that he would understand it. He also answered yes when asked, "Do you understand that if you're not a citizen of the United States, the consequences of the guilty plea could result in deportation, exclusion of admission to the United States, or denial of naturalization?"

After appellant pled guilty, the court accepted the plea and placed him on three years formal probation with terms and conditions including that he serve 360 days in county jail. In June 2005, appellant's case was transferred to the Ventura County Probation Department. His probation was successfully completed in June 2007.

Deportation proceedings were initiated against appellant in early 2017. In June 2017, he filed a motion to vacate his conviction pursuant to section 1473.7. In support of the motion, appellant filed a declaration stating that prior to entering his guilty plea his attorney had "advised me there would be no immigration consequences because I would spend less than a year in jail . . . and get probation for three years." Appellant

further stated that "[h]ad I known deportation was mandatory, I would not have risked the conviction." His attorney in the deportation proceedings also submitted a declaration stating, inter alia, that she "would have never advised the client to voluntarily place himself in a position where he would have been automatically deported and ineligible for deportation relief."

Appellant appeared at the hearing on the motion represented by new retained counsel. In opposing the motion, the prosecutor noted there was no "declaration from the actual criminal defense attorney who either advised or misadvised or didn't advise [appellant] of the immigration consequences and exactly what that conversation was." The prosecutor further noted that appellant had made "no mention" of the guilty plea form he signed or the reporter's transcript of the plea hearing, and that the minute order of the change of plea hearing reflected that appellant had been "'advised of the possible consequences of [the] plea affecting deportation and citizenship.'"

Appellant's attorney responded that "I did attempt to contact the original attorney [(Ciment)]. He's working for the United Nations somewhere so there's a bit of a time difference. He said he would call me and I will make the representation that I got a subsequent e-mail that . . . was not intended to come to me. It was a response to something else, but it was 2004. It was such a long time ago." Counsel also argued that the advisement in the guilty plea form and the advisement given by the court when appellant entered his guilty plea were not determinative because "under *Resendez* [*sic*][2] . . . it's what the attorney said."

At the conclusion of the hearing, the court stated that motions brought under section 1473.7 "have to be credible" and

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[2] *In re Resendiz* (2001) 25 Cal.4th 230 (*Resendiz*).

that appellant bore the burden of proof. The court also reviewed the guilty plea form and referred to the minute order stating that appellant had been "'advised of the possible consequences of [his] plea affecting deportation and citizenship.'" The court found that "the defense has failed to meet its burden as required under these types of motions" and accordingly denied the motion.

DISCUSSION

Appellant contends the court erred in denying his motion to vacate his conviction under section 1473.7. We are not persuaded.

Section 1473.7 provides in pertinent part: "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence [if] . . . [t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (*Id.*, subd. (a)(1).) The statute "allows a defendant, who is no longer in custody, to challenge his or her conviction based on a mistake of law regarding the immigration consequences of a guilty plea or ineffective assistance of counsel in properly advising the defendant of the consequences when the defendant learns of the error postcustody." (*People v. Perez* (2018) 19 Cal.App.5th 818, 828.) The burden is on the defendant to show, by a preponderance of the evidence, that he or she is entitled to relief. (*Id.* at p. 829.)

"Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to

relief under section 1473.7. [Citation.] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. [Citations.]" (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*)).

There is a current split of authority as to whether orders denying a section 1473.7 motion are reviewed for an abuse of discretion (see *People v. Gonzalez* (2018) 27 Cal.App.5th 738, 747–748), or de novo (see, e.g., *Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76). We conclude de novo review is appropriate where, as here, the defendant asserts that his conviction is invalid due to counsel's ineffective assistance in failing to adequately advise him of the immigration consequences of his plea. (*Ogunmowo*, at p. 76.) In conducting this review, "[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant." (*Ibid.*, citing *Resendiz*, *supra*, 25 Cal.4th at p. 249.)

A defendant's assertion that he would not have pled guilty but for counsel's misadvisements or failure to advise regarding the immigration consequences of the plea "'must be corroborated independently by objective evidence.'" (*Resendiz*, *supra*, 25 Cal.4th at p. 253.*)* The only evidence appellant offered to prove that Ciment had misadvised him was his own declaration. The trial court implicitly found the declaration was not credible, and substantial evidence supports that finding. (See *People v. Dillard* (2017) 8 Cal.App.5th 657, 665.)

Although counsel represented that he had communicated with Ciment regarding the motion, nothing was offered to indicate that Ciment was either unwilling or unable to provide his own declaration regarding the issue. Moreover, the contemporaneous evidence—which includes (1) appellant's signed guilty plea form in which he acknowledged his understanding that his plea "will have" negative immigration consequences, and that he had fully discussed the matter with Ciment; (2) Ciment's signed acknowledgment that he had explained appellant's rights to him as set forth in the plea form; and (3) the section 1016.5 advisement appellant was given prior to entering his plea—directly undermines his declaration.

A defendant seeking relief under section 1473.7 on the ground that his trial attorney provided ineffective assistance by misadvising him regarding the immigration consequences of his guilty plea must also establish prejudice, i.e., "a reasonable probability . . . that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, or proceeding to trial. [Citations.]" (*Resendiz*, *supra*, 25 Cal.4th at p. 253.) "In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court also may consider the probable outcome of any trial, to the extent that may be discerned. [Citations.]" (*Id.* at p. 254.)

Aside from his declaration, appellant offered nothing to support his assertion that he would have insisted on going to trial had he known a conviction would render him deportable. Appellant was arrested while transporting 480,000 pseudoephedrine pills. Moreover, he admitted knowing that the pills would be used to manufacture methamphetamine. He also

admitted he had transported other illicit substances on five or six prior occasions. By pleading guilty, he avoided a potential six-year prison sentence. Appellant thus fails to demonstrate he was prejudiced by counsel's alleged ineffective assistance. (*Resendiz*, *supra*, 25 Cal.4th at p. 254.)

Appellant also asserts that the court "rest[ed] its decision on a legal error" by finding that "the section 1016.5 advisement provided [him] sufficient warning of his immigration consequences." (Capitalizations omitted.) But the court made no such finding. The court merely referred to the court's advisement in finding that appellant had failed to meet his burden of proving that *Ciment* had misadvised him regarding the immigration consequences of his plea, i.e., provided ineffective assistance of counsel. Although appellant correctly points out that a section 1016.5 advisement is irrelevant to the determination whether counsel's misadvisements or failure to advise amounted to constitutionally deficient performance (see *Resendiz*, *supra*, 25 Cal.4th at pp. 241, 246), his position merely begs the question whether counsel actually misadvised him. As we have noted, his declaration to that effect finds no support in either the section 1016.5 advisement nor the advisements contained in his guilty plea form.

For the first time on appeal, appellant claims he is entitled to relief under section 1473.7 on the ground that the trial court failed to sufficiently advise him of the immigration consequences of his plea. Because this claim was not raised below, it is forfeited. (*People v. Hartshorn* (2012) 202 Cal.App.4th 1145, 1151.)

DISPOSITION

The order denying appellant's motion to vacate his conviction pursuant to section 1473.7 is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Bruce A. Young, Judge
Superior Court County of Ventura

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.